Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Palau National Communications Corporation	)	
Petition for Declaratory Ruling that Palau National Communications Corporation Is Subject to FCC Jurisdiction and Eligible to Participate in Universal Service Programs and the National Exchange Carrier Association	)	CC Docket No. 96-45
Petition for Related Waivers and Application for International Section 214 Authority	)	
Federal-State Joint Board on Universal Service	)	

COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Judy Sello
James J. R. Talbot
AT&T Corp.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920

James P. Young
Jennifer M. Rubin
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for AT&T Corp.

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Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and the Commission's Public Notice of December 6, 2001 (DA 01-2838), AT&T Corp. ("AT&T") submits the following comments on the Palau National Communications Corporation's ("PNCC") Petition for Declaratory Ruling and Related Waivers.

INTRODUCTION AND SUMMARY

PNCC seeks a declaratory ruling, along with a waiver of a host of rules, that would permit it to receive funding from the universal service fund even though it is a carrier operating in a foreign nation (the Republic of Palau). PNCC claims that Palau's Compact of Free Association ("Compact") with the United States confers FCC jurisdiction over the domestic services of PNCC, and it claims that such jurisdiction would entitle PNCC to funding from the universal service fund.

The Commission should reject PNCC's petition. The Compact does not give the FCC jurisdiction over PNCC's domestic services, because they are not "furnished by means of satellite earth terminal stations." *See* Compact § 131(a). Moreover, even if the FCC did have jurisdiction over such services, the FCC would have no authority to award PNCC universal service funding because Palau is not part of the "Nation" (*i.e.*, the United States) as required by Section 254(b)(3). Indeed, PNCC is indistinguishable from any other foreign carrier that is eligible for Section 214 authority to offer international services in the United States; such status does not entitle that carrier to funding for its domestic network from the universal service fund.

In addition, PNCC has not established that an expansion of the universal service program on behalf of Palau is warranted, even if the FCC had legal authority to do so. Contrary to PNCC's suggestion, the Commission's benchmark policy has had little effect on the U.S.-Palau route. Accounting rates remain high above the Commission's benchmarks, and settlement payments in 2000 exceeded those made both in 1995 and in 1996. PNCC has also failed to demonstrate any adverse impacts from call-back or refile. In all events, the FCC has held, and the D.C. Circuit has agreed, that foreign carriers are not entitled to subsidies embedded in the rates for international services.

ARGUMENT

I. PNCC'S PETITION IS CONTRARY TO THE COMPACT AND THE ACT.

PNCC seeks universal service funding even though, by virtue of the Compact, its home country of Palau has been an independent republic since 1994. Far from supporting PNCC's claim that it should be included in the universal service system, the Compact undermines that claim on two different grounds. First, the Compact makes clear that the FCC has no jurisdiction over PNCC's domestic services, because they are not furnished by means of satellite earth

stations. Second, even if the FCC did have such jurisdiction, Section 254(b)(3) would not permit PNCC to receive universal service funding, because Palau is not part of the "Nation" – *i.e.*, Palau is an independent country, not part of the United States. Accordingly, PNCC's petition should be rejected.

A. The FCC Does Not have Jurisdiction Over PNCC's Domestic Services.

PNCC's domestic telecommunications services – *i.e.*, the services that would be receiving universal service support – do not qualify as common carrier services subject to the Commission's jurisdiction under the Compact. As PNCC admits (at 17), Section 131(a)(2) of the Compact limits the extent of Commission jurisdiction to "all domestic and international services furnished by means of satellite earth terminal stations where such stations are owned or operated by United States common carriers and are located in Palau."

PNCC is not currently a United States common carrier (although it has filed a petition to be certified as such pursuant to Section 214). More fundamentally, however, PNCC admits that although it owns a Palau-based satellite earth station, it does not use that station for both domestic and international communications services, but only for international services. *Id.* at 19 ("[d]omestic – *i.e.*, intra-Palau – communications are not carried by means of the satellite earth station"). Thus, according to the plain terms of the Compact, the FCC has no jurisdiction over the domestic operations of PNCC. The FCC has no authority to regulate such services or to issue Section 214 authorizations for such services – and thus no authority to include such services in the universal service program.

PNCC's attempts to escape this dispositive fact are to no avail. First, PNCC argues that the Compact's drafters knew that, as of the time the Compact was drafted, PNCC did not provide any domestic service by means of satellite earth stations. PNCC claims that it would therefore

be "unreasonable" to read the Compact as applying only to services that are actually provided over satellite earth stations, because that "would write the word 'domestic' out of Section 131." PNCC at 19-20. That is nonsense. The mere fact that PNCC did not offer domestic service over satellite earth stations at the time the Compact was drafted does not mean that PNCC, or some other "United States common carrier," would never do so in the future. The Compact can only mean what it plainly says: the FCC shall have jurisdiction over Palau's domestic services when and if a "United States common carrier" ever furnishes such services by means of satellite earth stations.

PNCC also argues that the mere fact that the satellite earth stations interconnect with other facilities that do carry domestic services is sufficient, under the Communications Act, to transform those domestic services into services provided "by means of" satellite earth stations. *See* PNCC at 21. This is also nonsense. The cases PNCC cites stand for the proposition that the FCC may assert exclusive jurisdiction over facilities or equipment that are used to provide both local and interstate or international services if parallel state and federal regulatory programs are not possible as a practical matter. *See North Carolina Utils. Comm.* v. *FCC*, 552 F.2d 1036, 1048 (4th Cir. 1977); *Pub. Util. Comm. of Texas* v. *FCC*, 886 F.2d 1335 (D.C. Cir. 1989). But those cases can have no application here, because the facilities over which the FCC has jurisdiction – the satellite earth stations – do not carry any domestic traffic.

Indeed, PNCC's interpretation of these cases would radically expand the scope of the Communications Act. If the FCC could gain jurisdiction over services merely because they were offered over facilities that were *interconnected* with *other* facilities that carry interstate traffic, then the FCC would have jurisdiction to regulate virtually all local service in the United States. Moreover, under PNCC's theory, the fact that a foreign country's international facilities are

interconnected with the facilities that carry that country's domestic traffic would confer FCC jurisdiction over that foreign country's domestic services. That is plainly wrong.

Similarly radical is PNCC's suggestion that Palau's domestic services could be considered "incidental," and thus part of, Palau's international services. *See* PNCC at 21-22. PNCC suggests that the Compact's use of the phrase "by means of" echoes the Communications Act's use of the phrase "communications by wire" in 47 U.S.C. § 153(52). Even if this analogy were sound, the FCC has never held that local services could be considered "incidental" to interstate or international services, such that the Commission's jurisdiction over the latter would confer jurisdiction over the former. Certainly the authorities that PNCC cites (at 21-22), which involved truly incidental services relating to Western Union and collocation, do not support such a far-reaching proposition.

The Compact's language is plain. The FCC has jurisdiction over the domestic services of Palau only if a U.S. common carrier furnishes those services by means of satellite earth stations. That condition has not been satisfied, and the Compact's plain language cannot be twisted to say the opposite of what it says. The Commission cannot rewrite a Compact entered into by the President and Congress of the United States with a foreign country, made a Public Law, *see* P.L. 99-658 (1986), and codified in the United States Code, *see* 48 U.S.C. § 1931.[1]

B. PNCC Is Not Eligible To Be Part Of The USF System Under The Act.

Even if the FCC had "jurisdiction" over PNCC's domestic services, it does not follow that the FCC could provide universal service funding for such services. Indeed, Section 254 limits universal service funding to services within the "Nation" – *i.e.*, the United States.

[1] Because the FCC has no jurisdiction over PNCC's domestic services, the FCC has no authority to grant the waivers that PNCC seeks in its petition. In all events, as explained in Section II, *infra*, the policy grounds PNCC offers in support of its waiver requests are baseless.

47 U.S.C. § 254(b). PNCC's claim that the FCC should equate the "Nation" to the scope of the FCC's jurisdiction fails.

PNCC's claim is based on Section 254(b)(3), which is one of the seven principles upon which the Commission is to guide its universal service policies. *See Texas Office of Public Util. Counsel* v. *FCC*, 265 F.3d 313, 318 (5th Cir. 2001) ("Under the heading of '[u]niversal service principles,' § 254(b) lists seven factors that the FCC should follow in implementing the 1996 Act.") ("*TOPUC II*"). Section 254(b)(3) provides that "customers in all regions of the *Nation*, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . ." 47 U.S.C. § 254(b)(3) (emphasis added); *see Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001). PNCC argues that the term "Nation" is ambiguous, and the FCC should "interpret" that term to include Palau. PNCC at 23. The statute, however, simply will not bear that reading. Palau is not part of "the Nation" – it is not part of the United States, either as a State, a tribal reservation, a U.S. territory, or a U.S. possession. Moreover, the use of the term "insular areas" in Section 254(b)(3) cannot be construed to expand the scope of the term "Nation"; otherwise, any rural or insular area outside the United States could be deemed part of this "Nation" for universal service purposes. Thus, insular areas that are not part of the Nation – *i.e.*, part of the United States – are not eligible for USF payments under Section 254. In fact, the Commission has tentatively concluded that the term "insular areas" in Section 254(b)(3) should be limited to "islands that are territories or commonwealths of the United States." *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including*

Tribal and Insular Areas, Further Notice of Proposed Rulemaking, 14 FCC Rcd. 21177, ¶ 137 (1999) ("*Universal Service FNPRM*").[2]

Concluding that "Nation," as used in Section 254(b), is limited to the United States and its territories and possessions is also consistent with other provisions of the Act. For example, Section 1 of the 1934 Act provides that the Commission was created in order "to make available, so far as possible, *to all the people of the United States*, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, *Nation-wide*, and world-wide radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (emphasis added). Notably, Section 1 uses the term "Nation," capitalized, as distinct from the rest of the "world." Indeed, the Act consistently uses "Nation," capitalized, to refer to the United States, while reserving "nation," uncapitalized, to refer to foreign countries. *Compare* 47 U.S.C. § 225(b)(1) ("In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.") (emphasis added) *with* 47 U.S.C. § 606(h) (authorizing penalties for whose who violate President's orders under Communications Act War

[2] While it is true that the Commission also sought comment on whether this definition should be expanded to include other islands, such as Palau, *Universal Service FNPRM* ¶ 139, this fact does not bear the weight that PNCC seeks to put upon it, *see* PNCC Pet. at 26. The Commission's tentative conclusion is correct: only those insular areas that are part of the United States, such as a territory, may be considered part of "the Nation" under Section 254(b)(3). It is also significant that the Commission noted that "in other statutes, the term insular area generally refers to the island portions of the United States that are not states or portions of states," and that carriers in Palau and other Freely Associated States "are not subject to universal service

Powers provision, including actions taken "with intent to secure an advantage to any *foreign nation*") (emphasis added). Even more significantly, Section 1 makes clear that the Commission is charged with ensuring universal service for the people of the United States – not the people of an independent country. The geographic term "Nation" should be given "its ordinary common meaning," and should not be read more broadly in this construction of the statute. *AFL-CIO* v. *Donovan*, 757 F.2d 330, 349 (D.C. Cir. 1985). In short, as the Commission noted in the *Universal Service FNPRM* (¶ 138 n.261, emphasis added), "Section 254(b)(3) states the goal of providing access to those in insular areas, but it qualifies its coverage to '[c]onsumers in all regions of the Nation,' *thereby excluding consumers in other nations*."

Indeed, even at the time that the United States and Palau entered into the Compact, "the United States [did] not have nor claim[ed] sovereignty over the Trust Territory of the Pacific Islands, but exercise[d] control as Administering Authority pursuant to a United Nations Trusteeship Agreement." S. Rep. 99-403, 26, 1986 U.S.C.C.A.N. 6207, 6210. As such, Palau was never a "territory" of the United States the way that Guam or Puerto Rico is. In any event, after the two countries entered into the Compact, "Palau [became] self-governing, exercising full control over both internal and external affairs except in the area of defense." *Id.* at 27, 1986 U.S.C.C.A.N. at 6211. While the United States agreed to represent Palau in matters dealing with telecommunications, *id.*, the fact remains that, as the Commission has noted, Palau is an "independent, sovereign nation[ ]," *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report & Order, 11 FCC Rcd. 9564, ¶ 55 n.118 (1996).

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contribution requirements for the services they provide on these islands." *Universal Service FNPRM* ¶¶ 138-39.

Similarly, the legislative history cited by PNCC does not support its conclusion that Palau can receive universal service support. While it is true that the Conference Report on the Telecommunications Act of 1996 expressed interest in maintaining the USF for "'insular areas,'" the Report gave as its example of an insular area "the Pacific Island *territories*," S. Conf. Rep. 104-230, at 131 (1996) (emphasis added), which would include Guam – but not Palau. As such, the Report confirms the plain language, common-sense interpretation of Section 254(b): that USF is limited to the States and territories that comprise the "Nation" of the United States.

II. PNCC HAS NOT DEMONSTRATED THAT AN EXPANSION OF THE UNIVERSAL SERVICE PROGRAM IS NECESSARY.

Even if the FCC had legal authority to grant PNCC's petition (which it does not), PNCC has not established that an expansion of the universal service system on behalf of Palau is warranted. The FCC's benchmark and other pro-competitive policies have had no adverse impact on Palau, and in all events PNCC is not entitled to subsidies from international rates.

A. PNCC's Petition Demonstrates No Adverse Impact From the FCC's Benchmark And Other Pro-Competitive Policies.

PNCC's claims (at ii) concerning a "financial crisis" that has been "largely brought about by FCC policies reducing international accounting rates to benchmark levels and promoting a more competitive international telecommunications" fail to withstand scrutiny. Tellingly, PNCC provides no evidence of any adverse financial impact resulting from the Commission's benchmark policies or from the existence of refile, international call-back, and Internet telephony in the international market. In fact, FCC data demonstrate that the Commission's benchmarks and the other developments cited by PNCC have had no significant effect on the U.S.-Palau route.

First, the Commission's benchmark policies have had no effect thus far on the level of the U.S. accounting rate with Palau. Contrary to PNCC's claim (at 10) that "[t]he FCC's benchmarks settlements rules . . . are in the process of eliminating much of the implicit subsidy in PNCC's rate structure," the current FCC accounting rate report shows that the U.S.-Palau accounting rate remains far above benchmark levels at $1.00, and is unchanged since 2000, when it was reduced from $1.15.[3]

Second, neither the Commission's benchmark policies nor the other developments cited by PNCC have resulted in any clear long-term decline in U.S. carrier payments to PNCC. Indeed, FCC 43.61 data show that U.S. carriers' net settlements payments to PNCC were *fourteen percent higher* in 2000 ($655,000) than in 1995 ($573,000), two years prior to the issuance of the *Benchmarks Order*, and *twenty-four percent higher* than those made in 1996 ($528,000).[4]

Third, contrary to PNCC's claim (at 9) that it has been adversely affected by "arbitrage techniques such as 'refile,'" FCC 43.61 data fail to show any loss of U.S.-billed minutes consistent with the presence of significant refile activity affecting this route. In any event, any refile that does take place for U.S. calls to Palau should carry no weight in this proceeding, because it would merely show that PNCC has lower accounting rates with one or more third-party countries than with the United States. Since the Commission has long made clear that such

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[3] *See IMTS Accounting Rates of the United States*, 1985-2001, Jan 1, 2002, http://www.fcc.gov/ib/td/pf/artsweb.xls. *See also International Settlement Rates*, Report & Order, 12 FCC Rcd. 19806, ¶ 120 (1997) ("*Benchmarks Order*") (establishing benchmark settlement rates of $0.15, $0.19 and $0.23, equivalent to accounting rates of $0.30, $0.38 and $0.46, respectively, according to the economic development level of the relevant country).

[4] *See* Section 43.61 2000 International Telecommunications Data, Dec. 2001, Table A1; Section 43.61 1995 International Telecommunications Data, Feb. 1997, Table A1.

discrimination against U.S. carriers is contrary to the U.S. public interest and to ITU principles, PNCC accordingly should derive no benefit here from the existence of any such activity.[5]

Lastly, the FCC data also fail to show any adverse effect on PNCC from call-back, which would "turn[]outbound [*i.e.*, Palau-U.S.] calls into inbound [i.e., U.S.-Palau] calls" (at 9). Rather than showing any continued loss of foreign-billed minutes to PNCC, FCC 43.61 data in fact show that the volume of foreign-billed minutes on the U.S.-Palau route was *seventy percent greater* in 2000 (728,000 minutes) than in 1995 (433,000 minutes).[6]

B. Neither Palau Nor Any Other Foreign Country Is Entitled To Receive Disproportionate U.S. Subsidies From Settlement Rates.

Equally unfounded is PNCC's claim (at 12) that any loss of revenue resulting from the FCC benchmark policies would be "unintended" and require the replacement of "lost implicit subsidies." The Commission made clear in the *Benchmarks Order* that it "disagree[d] with commenters who argue[d] foreign carriers [were] entitled to require that universal service requirements be financed disproportionately through settlements revenues."[7] It also found settlements payments were "no longer a stable source of funding for network infrastructure development" in the changing global telecommunications market.[8] There was "widespread agreement" that "open and competitive markets that welcome private capital offer a more reliable and sustainable means to finance infrastructure development than the traditional accounting rate system."[9] Additionally, "other public sources of funding and technical

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5 *See Regulation of International Accounting Rates*, Report & Order, 6 FCC Rcd. 3552, ¶ 27 (1991) ("*International Accounting Rates Order*").

6 *Id*.

7 *Benchmarks Order* ¶ 148.

8 *Id*. ¶ 143

9 *Id*.

assistance" were also available, such as the World Bank, the Inter-American Development Bank, and the ITU.[10]

The D.C. Circuit affirmed that foreign countries have no entitlement to receive continued huge subsidies from U.S. consumers through high settlement rates. Many monopoly foreign carrier petitioners contended in support of their appeal of the *Benchmarks Order* that "the FCC's rate prescriptions inherently limit the ability of foreign governments and carriers to use settlement revenues to promote legitimate foreign social policies, such as universal service."[11] However, the D.C. Circuit upheld the *Benchmarks Order* "in its entirety," rejecting all these arguments.[12]

In any event, if PNCC was granted universal service funding, it should also be subject to other requirements of U.S. domestic regulation and should be paid the tariffed access charges that apply to domestic carriers rather than international settlement rates. It would plainly be unreasonable for U.S. consumers to provide universal service funding to PNCC while also continuing to pay PNCC international settlement rates that are significantly in excess of domestic access rates.

C. Granting Universal Service Funding To PNCC Would Undermine USF.

Providing universal service funding to PNCC would actually undermine the universal service system by improperly shifting universal service funds from the United States to a foreign country. "[T]he 1996 Act had [a] key goal of continuing the provision of affordable universal service to all Americans." *TOPUC II*, 265 F.3d at 318. Universal service funds come from a finite pool collected from United States consumers. Heretofore, those funds were used to ensure

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[10] *Id*. ¶ 145.

[11] Joint Petitioners' Br. at 35, *Cable & Wireless PLC* v. *FCC*, 166 F.3d. 1244 (D.C. Cir. 1999).

[12] *Cable & Wireless PLC* v. *FCC*, 166 F.3d. 1244 (D.C. Cir. 1999).

that Americans living in high-cost areas would be able to afford telecommunications service. If PNCC's petition were granted, however, some portion of those funds would be shifted from the United States to a separate, sovereign nation – Palau. As a consequence, either fewer funds would be available to subsidize service for underserved areas of the United States or the Commission would be forced to collect higher USF charges from United States consumers. *Cf. Offshore Tel. Co.*, 3 FCC Rcd. 4137, ¶¶ 43-44 (1988) (refusing to including "specialized carriers in NECA pools" because that would force "the nation's long distance callers generally" to pay the costs of those carriers).

Palau may seek special aid legislation from Congress or aid from other appropriate international bodies. The Commission has no authority, however, to expand the universal program to provide funding to upgrade local telephone networks in other countries.[13]

[13] PNCC's contingent application for Section 214 authorization to provide international resale services is therefore moot. PNCC also fails to show any independent basis for grant of its Section 214 application. Because Palau is not a Member of the World Trade Organization, Commission rules require PNCC to demonstrate that Palau meets the requirements of the effective competitive opportunities ("ECO") test before it may obtain such authorization. *See* 47 C.F.R. § 63.18(k)(3). PNCC does not make this demonstration and, rather, concedes in its petition (at 36) that three out of the four factors required by the ECO test do not exist in Palau. PNCC acknowledges (at 36-37) that Palau does not provide reasonable and nondiscriminatory charges, terms, and conditions as required by Section 63.18(k)(3)(iii), competitive safeguards as required by Section 63.18(k)(3)(iv), or an effective regulatory framework as required by Section 63.18(k)(3)(v). PNCC thus acknowledges that there is no pro-competitive regulatory framework in place in Palau today and fails to show that any such framework will exist in the future except pursuant to FCC rules following any grant of its petition (which, as shown above, the Commission has no authority to do).

CONCLUSION

For the foregoing reasons, the PNCC's Petition for Declaratory Ruling should be denied.

Respectfully submitted,

/s/ James P. Young

Mark C. Rosenblum
Judy Sello
James J. Talbot
AT&T Corp.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920

James P. Young
Jennifer M. Rubin
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for AT&T Corp.

January 7, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 7th day of January, 2002, on the following:

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A-325
Washington, D.C. 20554
By Electronic Filing

Sheryl Todd
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
By Hand (Three Copies)

The undersigned also certifies that a copy of the foregoing Comments of AT&T Corp. was served, by first-class mail, the 7th day of January, 2002, on the following:

David L. Sieradzki
Douglas A. Klein
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

/s/ Jennifer M. Rubin
Jennifer M. Rubin